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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. LUIS M. MEMBRENO and MIGUEL A. REYES, Defendants and Appellants.	B216861 (Los Angeles County Super. Ct. No. BA336008)

APPEALS from judgments of the Superior Court of Los Angeles County. Michael M. Johnson, Judge. Affirmed.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant Luis M. Membreno.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant Miguel A. Reyes.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Luis Membreno and Miguel Reyes of first degree murder. The jury found true the allegations that Membreno used and discharged a firearm proximately causing death and that in committing the murder he acted for the benefit of, at the direction of, or in association with a criminal street gang. The trial court sentenced Membreno to a total term of 50 years to life, consisting of 25 years to life for murder plus a consecutive term of 25 years to life for the discharge of a firearm causing death.[1] The court sentenced Reyes to a term of 25 years to life for the murder. Both defendants appeal their convictions.

Membreno contends that the evidence is insufficient to support his conviction, three instances of prosecutorial misconduct require reversal and the trial court committed prejudicial error by admitting hearsay evidence about shotgun murders in the area where this murder took place.

Reyes contends the trial court erred by failing to instruct the jury to view accomplice testimony with care and caution, by also failing to instruct on the lesser included offense of involuntary manslaughter, and by instructing the jury that an aider and abettor is "equally guilty" as the direct perpetrator. He further argues that cumulatively the instructional errors require reversal and that the abstract of judgment must be corrected to delete the order for gang registration under Penal Code section 186.30[2] because the jury did not find the gang enhancement true as to him.

Each defendant joins in the other's contentions to the extent they accrue to his benefit.

We affirm the judgments as to Membreno and Reyes. We remand Reyes's case to the trial court to correct his abstract of judgment regarding the order for gang registration.

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1 The court did not add a prison term for the gang enhancement because Penal Code section 12022.53, subdivision (j) prohibits imposing both the gang enhancement and the firearm enhancement under Penal Code section 12022.53, subdivision (d).

2 All statutory references are to the Penal Code except where otherwise indicated.

FACTS AND PROCEEDINGS BELOW

I. The Shooting

In May 2005, at approximately 8:15 p.m., Alfredo "Freddy" Reynaga, his cousin Daniel Salazar and their friend, Ricardo Perez, walked to a liquor store at Western Avenue and 39th Place in Los Angeles. As they entered the store a gray Lincoln Continental Town Car turned onto 39th Place. After passing the liquor store, the car made a U-turn. Reynaga and his companions exited the store and started walking in the direction of the car. Reynaga was walking ahead; Salazar and Perez were slightly behind. The car stopped next to them and the passenger, who was sitting behind the driver, lifted a shotgun. The passenger first pointed the gun at Salazar and Perez and then, when they ducked, aimed at Reynaga and fatally shot him in the back. At the time of his death, Reynaga was 18 years old, 6 feet, 1 inch tall and weighed 315 pounds.

II. The Police Investigation

Witnesses interviewed at the scene produced the following information. The shooter's vehicle was a 1990 to 1999 silver gray Lincoln Continental Town Car. The gunman was masked. The driver had a skinny face, a large nose. One eyewitness saw an infant seat in the Town Car; another saw an infant. The shooting occurred in territory claimed by the Alley Tiny Criminals (ATC). ATC's rivals included Membreno's gang, the 46th Street Tokers (46th Street), as well as the Street Villains, the Harpys and the 18th Street gang. The shotgun was a "long" gun like a rifle but "cut off."

The investigating officers learned that in February 2005, three months before the shooting, Victor Alvarez reported to the police that his niece, Caroline de la Cruz, had stolen his 12 gauge Remington 870 shotgun with a pistol grip. De la Cruz told the police that in February 2005 she took her uncle's three-foot shotgun with its tubular magazine full of shells and gave it to Membreno and his sister Rachel, wrapped in a bed sheet imprinted with characters from "The Simpsons" television show. After her uncle discovered the gun missing, she asked Membreno to return it, but he told her that he could not get it back. In March 2005, the police obtained a search warrant for

Membreno's residence. They did not find the shotgun but did find a "Simpsons" bed sheet. At trial, de la Cruz repeated her story about stealing the shotgun and giving it to Membreno.

In February 2006, nine months after the shooting, Membreno's sister, Mariela, disclosed several details of the shooting to Reynaga's sister, Yolanda, including that the gunman had used a shotgun and that the perpetrators were not members of the Harpys or the 18th Street gang. Mariela refused to tell Yolanda the source of her information. A month later, Yolanda's mother reported Yolanda's conversation to Detective Michael Whelan, the investigating officer. When Whelan interviewed Mariela, she denied that she said anything to Yolanda about a shotgun being used in the shooting or anything about the assailants' gang membership. She claimed someone named "Criminal" had told her about the shooting. Whelan's investigation led him to believe that Mariela was an associate of 46th Street, her brother's gang.

In November 2007, J.M., a member of Rolling 30's Crips, was in jail and hoping to be moved into protective custody. He made a recorded statement in which he implicated his childhood friend, Membreno, in a killing. He said that in early 2006 Membreno bragged about killing somebody with a shotgun. Believing that the shooting Membreno admitted might have been Reynaga's, Detective Whelan placed J.M. and Membreno in the same cell and recorded their conversations which were played to the jury.

In those conversations Membreno stated that just as it was getting dark, at 37th Street and Western Avenue, he "got" a person called "Sniper," who he also referred to as "Freddie," a "fat, big" kid.[3] He further stated he shot Freddie in the back with a 12 gauge shotgun he got from a person whose description fit Caroline de la Cruz. The shotgun was loaded with shells filled with buckshot. Membreno also told J.M. on the tape that Reyes, the father of his sister's children, was the driver. He described the car as a gray Lincoln

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[3] J.M. testified that Membreno's claim that he "got" Freddie meant that he had killed him.

Continental Town Car and stated the car was taken by the police two weeks after the shooting. J.M. asked what happened to the gun and Membreno replied that he gave it to "Bear," who took it apart to clean it and could not put it back together again. Some "Homies" came from Arizona, and Bear gave it to them.

At trial, J.M. testified that Membreno took credit for killing "Freddy" whom he described as a "fat kid," 21 or 22 years of age. J.M. said that in context, Membreno's claim that he "got" Freddy meant that he shot him.

Detective Whelan testified that he offered J.M. nothing in return for his testimony, although he acknowledged the informant's decision to testify may have affected the sheriff's decision to place him in protective custody.

In January 2008, Detective Whelan interviewed Reyes about the shooting. At first Reyes responded that he didn't know anything about a Town Car. However, when confronted with documentation that his father had owned a Lincoln Continental Town Car in 2005 and that a week after the shooting Reyes had received a traffic citation while driving that car, he admitted driving his father's gray Town Car and that it contained an infant seat. Reyes said he had no relationship with Membreno after he "separated" from Membreno's sister, Rachel, that he was "'not really'" a friend of Membreno's and he "tries to stay away from people like that." When confronted with Membreno's participation in the shooting, Reyes replied, "I never thought he was capable of doing something like that." Told that he had been identified as the driver, Reyes responded that whoever identified him was mistaken, that he "wasn't capable of doing something like that" and that he wouldn't do something like that because he had a child, a job and a good business.

Also in January 2008, Reynaga's cousin, Salazar, identified Reyes as the driver from a six-pack photographic lineup. At a live line-up in April 2008, however, Salazar could not indentify Reyes and at trial he admitted that at the preliminary hearing in August 2008 he identified Membreno as the driver. At trial, Perez also identified Membreno as the driver.

III. The Gang Testimony

Officer John Flores, a gang expert, testified that in his opinion Membreno belonged to the 46th Street gang based on Membreno's admissions during police contacts, his display of gang tattoos and his association with 46th Street gang members. Although Reyes had tattoos consistent with being a 46th Street gang member, Flores could not say that Reyes was a gang member based on the generic gang-type tattoos alone; an associate could also display such tattoos. He explained that someone could be a gang member without necessarily being "documented" and, in addition to actual gang members, the gang had associates and "wannabe[s]."

Flores explained that it is not uncommon for gang members to live in rival territory, as did Membreno. In drive-by shootings, gang members target other gang members, but also sometimes shoot unaffiliated youths they find in their rival's territory. It is unusual for a gang member to commit a drive-by shooting in the company of a non-gang member but it happens, particularly where there is a family relationship. Where a relative assists in a shooting, he may be trying to show the gang that he can be trusted, in the hopes of being asked to become a member. A gang associate or a "wannabe" can earn respect from gang members if he participates in a "mission," i.e., he enters rival gang territory to commit a preplanned drive-by shooting.

Finally, Flores testified that after a shooting, gang members may brag to "get the word out" to elevate their reputation. In the gang culture, there can be severe consequences, including death, for falsely claiming that you committed a shooting.

IV. Reyes's Defense

Reyes did not testify.

Reyes's father, Miguel Ramirez, employees at Ramirez's business, and a person working in the next building, provided an alibi for Reyes. Ramirez and his employees testified that on the evening of the shooting Reyes had worked until 9:00 p.m. at the business and then accompanied his father and family to a restaurant for a sister's birthday party. The next-door worker confirmed that he saw Reyes at the business location at

8.30 p.m. Reyes's father admitted that in 2005, he owned a 1990 Lincoln Continental Town Car that was impounded and destroyed a week after the shooting. He insisted that it was light blue, not gray, did not contain an infant seat and that he did not permit Reyes to drive the car except to move it, but only close to the house, and only for a good reason like on street sweeping days.[4] At the time of the shooting Reyes had been a full time employee at his father's business since it opened in 2001.

Several eyewitnesses testified that the car they observed during the shooting was something other than a gray Lincoln Town Car.

A gang intervention specialist disputed several critical opinions rendered by Officer Flores. She testified that it was unlikely that an employed, 22-year-old man not affiliated with a gang, would commit a crime in order to join a gang. A gang member might lie about perpetrating a drive-by shooting to elevate his status in prison and, in her opinion, in the gang culture no severe consequences flowed from making such false claim.

In an attempt to discredit the color notation on Reyes's citation, Reyes called an investigator employed by the Los Angeles County Public Defender who had been previously employed as a police officer. He testified that in his experience some sun glasses distort the color of a vehicle.

Officer Ramiro Cabrera testified that immediately after the shooting officers stopped a white Cadillac occupied by two Hispanic youths. The Cadillac's passenger left the Cadillac before the officers could approach and was not interviewed. The police drove Reynaga's cousin, Salazar, and his friend, Perez, to the site of the stop. Both men said the driver of the Cadillac had facial features similar to the driver of the murder

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4 No Department of Vehicles records were available concerning the Town Car 's color because it was impounded and destroyed in 2005. Officer Ricardo Dominguez testified that on June 3, 2005, he stopped Reyes at Menlo and 40th Place, about two blocks from his home. The prosecution also introduced the June 3, 2005 impounding police officer's testimony that the color of an impounded car was important because it aided the identification of the vehicle. For that reason, the officer had taken particular care to record the Town Car's color as gray.

vehicle, but indicated the Cadillac was not the car used in the shooting. There was 18th Street writing and a Nintendo player in the Cadillac, and a Nintendo game found crushed on the street at the shooting site matched the Nintendo player in the Cadillac.

V. Membreno's Defense

Membreno did not testify nor did he present an affirmative defense. He attempted to discredit the prosecution's evidence, especially the testimony of the informant J.M.

DISCUSSION

I. SUFFICIENCY OF THE EVIDENCE

Membreno challenges the sufficiency of the evidence. He argues that he was never identified as the gunman, no other evidence linked him to the shooting, and the evidence concerning the Town Car's identification was equivocal. He claims that J.M.'s testimony was critical to establishing his guilt but maintains J.M. was a snitch whose testimony was too unreliable to support a conviction. He contends his tape-recorded admission of the crime was mere braggadocio designed to enhance his reputation among other inmates and thereby obtain sufficient status in prison to protect himself from harm.

"'When considering a challenge to the sufficiency of the evidence to support a criminal conviction, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt."'" (*People v. Williams* (1997) 16 Cal.4th 635, 678.)

Strong evidence supports Membreno's guilt. Not only did he admit killing Reynaga, relating details markedly similar to eyewitness descriptions of the shooting, but he was circumstantially connected to the murder by the gun he obtained from de la Cruz, his sister's knowledge of unpublicized details of the shooting, the eyewitness identification of Reyes as the driver of the car and his relationship to Reyes.

In his conversations with J.M., Membreno admitted committing a shooting with details that were so markedly similar to Reynaga's shooting that they strongly indicated that he was the gunman. Among other unique details surrounding the crime, Membreno admitted using buckshot, the same ammunition found in Reynaga's body. De la Cruz testified that Membreno had access to a shotgun in May 2005 because in March of that year she gave him her uncle's loaded shotgun. Membreno's sister knew a number of details about the murder that were not publicized by the police, including that a shotgun was used to shoot Reynaga. Reyes, who Membreno implicated, was identified as the driver, and was the former boyfriend of Membreno's sister and the father of her two young children. At the time of the shooting, Reyes's father owned a gray 1990 Lincoln Town Car, and at least three eyewitnesses identified a photograph of a similar gray 1990 Town Car as that used in the shooting. When confronted by Detective Whelan, Reyes made evasive statements about access to a Town Car then admitted he was driving such a car in 2005 and that it contained an infant seat as stated by witnesses. Reyes resembled the description of the driver given by the eyewitnesses in 2005, and the Town Car he had been driving was impounded and destroyed a week after the shooting.

Admittedly, the prosecution did not forensically match shotgun pellets that killed Reynaga to Alvarez's shotgun, there were some discrepancies in the eight eyewitnesses' descriptions of the assailants, the shotgun and the car used in the shooting, and Membreno's recorded statement admitting the murder could possibly be interpreted as a ploy to gain stature among his fellow inmates. Nevertheless, we affirm so long as the evidence considered as a whole is substantial. Here the totality of the evidence supports the conviction.

Membreno argues that his guilt was not established because his admission was obtained by the use of a jailhouse informant. Generally, an informant's testimony is entitled to the weight the jury affords it. (Evid. Code, § 411; *People v. Alcala* (1984) 36 Cal.3d 604, 623-624.) In any event, Maura's testimony was supported by tape-recordings of their conversations witnessed by Detective Whelan. Membreno's statements in those

conversations were presumably reliable because they were against his penal interest. (See *People v. Fuentes* (1998) 61 Cal.App.4th 956, 961 [a declaration against penal interest is admitted because of its likelihood to be true].)

II. DETECTIVE WHELAN'S TESTIMONY REGARDING SHOTGUN KILLINGS

On direct examination, Detective Whelan testified, without objection or request for a hearing to establish foundation, that Reynaga's murder was the only shotgun murder in the area of Western Avenue and Martin Luther King Boulevard during the years 2003-2007. On cross-examination Whelan explained that he obtained this information from an employee of the police department whose job it was to keep this kind of crime statistic. Reyes's counsel asked the court to strike all of Whelan's testimony on this point because it was hearsay. The court denied the request.

As we observed above, only Reyes, not Membreno, asked that the testimony be stricken. Membreno's failure to timely object in the trial court results in a forfeiture of his contention on appeal. (*People v. Partida* (2005) 37 Cal.4th 428, 433-435; *People v. Lewis* (2001) 26 Cal.4th 334, 357.) Further, neither defendant objected on Sixth Amendment grounds so that ground is forfeited. (*People v. Alvarez* (1996) 14 Cal.4th 155, 186.) In any case, even if we assume that Whelan's testimony was hearsay, the failure to strike it was not prejudicial. Other evidence not objected to by either defendant covered the same point as did Whelan's testimony. Thus, Officer Hardiman testified that in Los Angeles County it is relatively uncommon for someone to be shot with a shotgun. Reyes had the burden of showing that admission of Whelan's testimony was prejudicial. (*People ex rel. City of Santa Monica v. Gabriel* (2010) 186 Cal.App.4th 882, 887.) Given that testimony similar to Whelan's was admitted without objection and that the evidence of Reyes's guilt was strong, it is not reasonably probable that Reyes would have obtained a more favorable result if Whelan's testimony had been excluded. (Cf. *People v. Garcia* (2008) 168 Cal.App.4th 261, 292.)

III. PROSECUTION MISCONDUCT

Membreno and Reyes maintain that the prosecutor committed three instances of misconduct. He failed to inform Membreno of the location of a key witness in time to conduct a pre-testimony interview, he failed to disclose the data bases and reports the police analyst used in researching the frequency of shotgun killings in the area of Reynaga's murder, and he called the jury's attention to Membreno's invocation of his Fifth Amendment right to remain silent when questioned about the stolen shotgun.

A. Failure to Disclose the Whereabouts of Caroline De La Cruz

Reyes served a subpoena on de la Cruz who stole her uncle's shotgun and gave it to Membreno. (See discussion *ante*, at pp. 3-4.) The subpoena is not in the record but apparently it called for de la Cruz to appear at a pretrial hearing on November 3, 2008. She did not appear and the court issued a body attachment in the amount of $50,000 to be held until the next court date, November 7, 2008. De la Cruz did not appear on November 7, 2008, and the court ordered a body attachment to issue "forthwith." Pretrial proceedings were continued to December 4, 2008. De la Cruz did not appear on December 4, 2008 or at the next four pretrial hearings.

When de la Cruz appeared at the trial on March 3, 2009, Reyes asked the court to inquire whether the prosecutor knew her whereabouts when she was ignoring his subpoena to appear at pretrial proceedings. Reyes argued that if the prosecution team knew de la Cruz's whereabouts when she failed to appear as directed in the subpoena then it had a duty to inform Reyes. The prosecution's failure to do so, Reyes contended, prevented him from interviewing de la Cruz and investigating her statements before she testified at trial. It also prevented the defense from locating, interviewing and potentially calling as a witness her uncle, Victor Alvarez, the owner of the shotgun allegedly used in the murder. (Reyes sought the uncle's address through discovery but apparently did not obtain it.) Reyes contended, "if [de la Cruz] was secreted from us, from the defense, she

shouldn't be allowed to testify." The prosecutor responded: "[A]t the time he asked for the body attachment I did not know where she was" and "counsel never asked me."

The court ruled that there was no need for an inquiry into whether the prosecutor knew de la Cruz's whereabouts at the time she was defying the subpoena. "She's here now," the court stated, "[t]hat was what the defense wanted to accomplish by issuing the subpoena." The court further stated that if the defense believed that de la Cruz had intentionally failed to comply with the subpoena the defense "can cross-examine her on that and argue that that goes to factors relating to her credibility."

De la Cruz admitted on cross-examination that she had been served with the defense subpoena. She testified she ignored the subpoena because: "I didn't want to deal with none of this stuff." Asked why she came to court to testify she answered that her brother and sister and her mother told her she had to. Reyes also asked de la Cruz for her uncle's address but the court sustained a relevancy objection by the prosecution.

On appeal, defendants' contend that the prosecutor committed misconduct in not revealing de la Cruz's whereabouts prior to trial.

We need not decide whether the argument was forfeited or whether the prosecutor had an affirmative duty to inform defense counsel of de la Cruz's location if he was aware of it because the record contains no evidence that anyone on the prosecution team knew de la Cruz's whereabouts at any time during the proceedings. Reyes argues that the prosecutor must have known where de la Cruz was prior to trial because she appeared to testify at the appointed hour. We disagree. De la Cruz testified that "they" contacted her aunt about de la Cruz coming to court and her brother, sister and mother told her she had to come. Assuming that "they" were persons on the prosecution team the evidence does not show that "they" contacted de la Cruz directly, much less that "they" knew where she was living. Further, defendants have not met their burden to show a reasonable probability of a different result if the prosecution had informed the defense of her whereabouts.

B. Failure to Disclose Information Possessed by the Prosecution's Data Analyst

Defendants argue that the prosecution committed misconduct by not turning over information possessed by its data analyst regarding the number of shotgun murders in the area between 2003 and 2007. (§ 1054.1, subd. (e).) Although defendants became aware of the existence of this information when Detective Whelan testified (see discussion *ante*, at pp. 14-15), neither defendant lodged a discovery objection or claim of misconduct at trial. We agree with the Attorney General that the objection was forfeited. (*People v. Carter* (2005) 36 Cal.4th 1215, 1264.) Reyes's raising the issue in his motion for new trial did not preserve the issue for appeal. (See *People v. French* (2008) 43 Cal.4th 36, 46.)

Defendants also contend the prosecution's failure to turn over the shotgun data constituted a *Brady* violation (*Brady v. Maryland* (1963) 373 U.S. 83) which can be raised for the first time on appeal. (*People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1471, fn. 5.) *Brady* violations are limited to the failure to provide exculpatory evidence. (*In re Brown* (1998) 17 Cal.4th 873, 878.) The shotgun evidence was not exculpatory.

C. Calling Attention to Membreno's Exercise of His Right to Remain Silent.

Detective Craig Dean testified that in March 2005 he and other Los Angeles police officers conducted a search of Membreno's residence in connection with the theft of Victor Alvarez's shotgun. Without objection, the prosecutor elicited Dean's testimony that he attempted to interview Membreno about the stolen shotgun but Membreno "invoked his rights." On appeal, Membreno asserts that it was misconduct for the prosecutor to deliberately elicit evidence that he invoked his constitutional right to remain silent when questioned by the police, regardless of whether he was in custody or had been *Mirandized*. (Cf. *People v. Waldie* (2009) 173 Cal.App.4th 358, 366; and see Romantz, "You Have The Right To Remain Silent": A Case For The Use Of Silence As Substantive Proof Of The Criminal Defendant's Guilt (2005) 38 Ind. L. Rev. 1, 28-47.) Anticipating the Attorney General's argument that he forfeited this issue, Membreno

argues that a violation of his rights under the 5th and 14th Amendments is not waived by his failure to object at trial, citing *People v. Vera* (1997) 15 Cal.4th 269, 276-277. We need not decide whether Dean's testimony violated Membreno's right to remain silent or whether Membreno forfeited the issue by not raising it at trial. The error, if any, was harmless beyond a reasonable doubt.

The shooting that formed the basis of the murder charge against Membreno had not occurred in March 2005 when Membreno invoked his right to remain silent. Because the murder did not occur until May 2005, the jury would have no reason to infer that his silence evidenced a consciousness of guilt with respect to the murder. If anything, the jury might infer from Membreno's silence that he was involved in the theft of the shotgun. Other evidence of that involvement, however, was overwhelming. Membreno admitted the theft to J.M. in their taped jailhouse conversation and de la Cruz testified that she gave the gun to Membreno.

D. Instructional Error

Membreno contends that cumulative instructional error deprived him of a fair trial. As to Membreno, however, there were no errors in the jury instructions, and thus no cumulative error to examine.

IV. THE "EQUALLY GUILTY" INSTRUCTION ON AIDING AND ABETTING

Reyes contends that the trial court erroneously instructed the jury under CALJIC No. 3.00 that one who aids and abets is "equally guilty" of the crime as the direct perpetrator.[5] He argues that in a first degree murder case in which, as here, the prosecution does not rely on the natural and probable consequences doctrine, the instruction's "equally guilty" language eliminates the prosecution's burden to prove beyond a reasonable doubt the aider and abettor's intent, willfulness, deliberation and

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[5] The court instructed the jury: "People who are involved in committing a crime are referred to as principals in the crime. Each principal, regardless of the extent or manner of participation is equally guilty. Principals include . . . those who aid and abet the commission of the crime."

premeditation and permits the jury to simply assume the perpetrator and the aider and abettor shared the same intent, willfulness and deliberation. (See *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1164-1165 disapproving, in dictum, the "equally guilty" language in a former version of CALCRIM No. 400.) Reyes further contends that because the error omits an element of a charged offense it requires reversal of his conviction unless we can say beyond a reasonable doubt that the jury's verdict would have been the same absent the error. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (2001) 26 Cal.4th 779, 797, dis. opn. of Kennard, J.)[6]

We need not decide whether Reyes's analysis of the CALJIC "equally guilty" instruction is correct (CALJIC instructions are no longer in general use) because even if the court erred in giving the instruction, the record shows beyond a reasonable doubt that the error did not contribute to the jury's verdict. (See *People v. Samaniego*, *supra*, 172 Cal.App.4th 1148, 1165 [the "equally guilty" instruction violates the defendant's right to a jury trial and is subject to the harmless error test of *Chapman v. California*, *supra*, 386 U.S. 18, 24].)

Here, we are convinced beyond a reasonable doubt from the totality of the instructions that the jury understood that it had to determine Reyes's guilt of first degree murder based on his own *mens rea*, not that of Membreno. For example, early in its instructions the court told the jury to "consider the instructions as a whole and each instruction in light of all the others." Immediately after giving the "equally guilty" instruction the court instructed the jury: "A person aids and abets the commission of a crime when he: . . . with knowledge of the unlawful purpose of the perpetrator, and . . . with the intent or purpose of committing or encouraging or facilitating the commission of the crime, . . . by act or advice, aids, promotes, encourages or instigates the commission

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6 The Attorney General argues that Reyes forfeited any error by not raising it in the trial court. As the Attorney General is well aware, however, section 1259 permits review of an allegedly erroneous instruction despite the lack of an objection or request for amplification if the error affects a defendant's "substantial rights." An instruction that removes an element of the offense from the jury's consideration is such an error. (*People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 6.)

of the crime." The court further instructed the jury that "[a]ll murder which is perpetrated by any kind of willful, deliberate, and premeditated killing with express malice aforethought is murder of the first degree" Taken together these instructions told the jury that to convict a defendant as an aider and abettor it not only had to find that the defendant had knowledge of the criminal purpose of the direct perpetrator of the offense, but that it also had to find that the defendant shared that purpose or intended to commit, encourage or facilitate the commission of the crime which means the aider and abettor also acted willfully, deliberately and with premeditation.

Furthermore, as the court pointed out in *People v. Samaniego*, "[i]t would be virtually impossible for a person to know of another's intent to murder and decide to aid in accomplishing the crime without at least a brief period of deliberation and premeditation, which is all that is required." (172 Cal.App.4th at p. 1166.)

Alternatively, the court instructed the jury that "[m]urder which is perpetrated by means of discharging a firearm from a motor vehicle intentionally at another person outside the vehicle, when the perpetrator specifically intended to inflict death, is also murder in the first degree." The court added that "[t]he essential elements" of a drive-by murder include: "[a] person committed the crime of murder [and that person] specifically intended to kill a human being." Again, these instructions, together, told the jury that Reyes had to know that Membreno intended to commit a drive-by shooting with the intent to kill and that Reyes drove the car with the intent of "encouraging or facilitating the commission of the crime" that Membreno intended to commit.

But even if we found that the "equally guilty" instruction could have misled the jury, we still would not reverse Reyes's conviction because, given the evidence, "no reasonable trier of fact, having actually found the requisite knowledge, could at the same time have concluded that the defendant did not act for the purpose of facilitating or encouraging the crime." (*People v. Croy*, *supra*, 41 Cal.3d at p. 14.)

Here the evidence of Reyes's requisite knowledge—the shooter's intent—was very strong. According to the undisputed evidence, there were only two occupants of the

Town Car: the driver and the shooter. The shooter was in the back seat behind the driver where he had a clear shot through either rear window. The shooter was not holding a small pistol that could be easily concealed but a large and heavy rifle-length 12 gauge shotgun, a weapon that Reyes, as the driver, could hardly have missed when the shooter entered the car. The Town Car turned onto 39th Place just as Reynaga and his companions entered the liquor store. As they left the store and started to walk home, the Town Car made a U-turn, pulled alongside of them and stopped. This gave the shooter a level, steady platform from which to fire the shotgun. As soon as the shooter fired the fatal shot, the Town Car sped away. This evidence shows beyond a reasonable doubt that Reyes acted with full knowledge of the shooter's purpose to kill Reynaga or one of his companions and intended to aid the shooter in accomplishing that purpose.

V. OTHER ALLEGED INSTRUCTIONAL ERRORS

Reyes makes two additional contentions regarding the instructions. He claims that he was entitled to an instruction on accomplice testimony and on the lesser offense of involuntary manslaughter. Membreno joins in these contentions. We conclude that failure to give the accomplice instructions was harmless error and that neither defendant was entitled to an instruction on involuntary manslaughter.

The court's failure to give accomplice instructions was harmless for three reasons.

Membreno's statements incriminating Reyes were not made under questioning by the police where Membreno might have had an incentive to minimize his culpability and emphasize Reyes's. Instead, Membreno made the statements to J.M., a trusted friend, and rather than trying to minimize his role he bragged about killing the "fat kid."

Furthermore, Membreno's statements identifying Reyes as the driver of the Town Car were sufficiently corroborated. Reyes admitted that at the time of the murder he had access to a Lincoln Town Car that matched witnesses descriptions of the car used in the slaying. He also admitted that a week after the shooting he received a traffic citation while driving the car and the car was impounded. No one retrieved the car from the impound lot and it was destroyed. A jury could reasonably infer that Reyes or his father,

the owner of the car, deliberately allowed the car to be demolished in order to destroy evidence of the crime.

Finally, when the police questioned Reyes, he initially denied any connection to a Lincoln Town Car but later admitted that his father had owned such a car at the time of the shooting, thus evidencing a consciousness of guilt. (See *People v. Cook* (2006) 39 Cal.4th 566, 601 [omitting accomplice instructions is harmless where there is ample corroboration].)

The court did not err in failing to instruct on involuntary manslaughter because there is no substantial evidence Reyes or Membreno committed a lesser offense than first degree murder. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 414.)

VI. GANG REGISTRATION REQUIREMENT

Reyes contends the gang registration requirement reflected in the abstract of judgment and clerk's minute order must be stricken because the jury found the gang enhancement allegation not true as to him. Respondent agrees as do we.

We will remand Reyes's case to the trial court for correction of the abstract of judgment and minute order.

DISPOSITION

Membreno's and Reyes's judgments are affirmed. Reyes's case is remanded to the trial court with directions to strike the gang registration requirement from its minute order and abstract of judgment, to prepare an amended abstract of judgment and to forward a copy thereof to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

CHANEY, J.